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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 107

ERNEST KREHER, MAX KREHER, PAUL KREHER, TRUSTEES OF TAMPA SHIPBUILDING & ENGINEERING COMPANY, A DISSOLVED CORPORATION,

Petitioners,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO REVIEW JUDGMENT OF THE COURT OF CLAIMS

The petitioners respectfully show to the Court, as follows:

Summary and Statement of Matter Involved

1. This matter involves the sum of $2,078,000.00, with interest, which petitioners claimed in a petition heretofore filed in the Court of Claims, growing out of the taking and confiscation by the United States Government for its own use and benefit in 1940 of the Tampa Shipbuilding & Engineering Company, a corporation, which was a shipyard with extensive land, buildings, dry-dock, machinery and equipment acquired over a period of forty years, and built to the pinnacle of one of the largest shipyards on the East Coast

of the United States by the three aforementioned petitioners, who became its trustees after the aforesaid taking by the United States. During World War I, Tampa Shipbuilding and Engineering Company held the highest rating for construction of steel ships in the United States. The defendant below, the United States, in November 1940 took over and confiscated the shipyard in direct disregard and violation of the Fifth Amendment of the Constitution of the United States, taking same without due process of law and without any compensation. The taking by the Government was accomplished by allowing and directing its representatives, trustee and employees, who paid neither a cent nor invested a nickel therein, to organize and operate for the benefit of the United States a corporation known as the Tampa Shipbuilding Company, a corporation. The president of this new corporation was one George B. Howell, who was for years immediately prior thereto a trustee for the Government acting as trust officer for the Exchange National Bank, Tampa, Florida, the said bank acting as such for the Government in the matter of loans made to the Tampa Shipbuilding & Engineering Company by the PWA and the Reconstruction Finance Corporation. Mr. Howell put up $500.00 for the Government in order for the new corporation to qualify under the Florida statutes and was later reimbursed therefor. The vice president was one P. B. Brili, who was an *employee* of the United States Maritime Commission and had been placed as general manager of the Tampa Shipbuilding & Engineering Company by the Maritime Commission at its direction when there was no necessity for such placement and over the protest of Ernest Kreher, president of the Tampa Shipbuilding & Engineering Company. The secretary and treasurer was J. W. Gray, who had been placed by the Government in both companies; and the assistant secretary and treasurer was one

B. C. Stafford, who had immediately prior thereto been an employee of the Reconstruction Finance Corporation and who was given this office in the Tampa Shipbuilding Company by the Government to look after the interests of the Reconstruction Finance Corporation under its loans to the Tampa Shipbuilding & Engineering Company and the Tampa Shipbuilding Company.

2. The main purpose for the taking of the said shipyard by the United States was the need of the United States Navy in having a shipyard in Tampa, Florida, and particularly the Navy wanted the dry-dock of the Tampa Shipbuilding and Engineering Company. Immediately upon the organizing of the Tampa Shipbuilding Company by the United States, its branch, the United States Navy, dealt with it exclusively until 1945 when the war was over, having completed contracts for the Navy during that period totaling $193,000,000.

3. It was admitted by the Assistant General Counsel for the United States Maritime Commission, who was one of the authors of the plan by which the Government took the shipyard, and who handled the incorporation of the new company, that the Tampa Shipbuilding & Engineering Company would have been reimbursed for the taking, had the Government then had the powers it later derived under the War Powers Act under which the shipyard would have been confiscated and just compensation paid, but not having such powers no arrangement for compensation was made.

4. The events leading up to the taking of the shipyard by the Government grew out of certain ship contracts let by the U. S. Maritime Commission to the Tampa Shipbuilding and Engineering Company. Under date of May 21, 1938 the United States Government, acting through the

Maritime Commission, entered into four contracts with the engineering company for the construction of four C-2 vessels, known as Hull Nos. 33, 34, 35, and 36, respectively, the contract price for each vessel being approximately $1,180,000. Also, on October 25, 1939, the United States through the Maritime Commission entered into four additional contracts with said company for the construction of four C-2 vessels, known as Hulls Nos. 37, 38, 39, and 40, respectively, at a contract price for each vessel of approximately $1,950,000. At the very outset of the performance of the first four contracts, the Maritime Commission insisted that the contracting company place men from the Maritime Commission in charge as general superintendent, hull superintendent, and machinery superintendent of the shipbuilding company. The president of the company, Mr. Ernest W. Kreher, who had headed the company for forty years as an engineer in building ships, protested such action without avail and finally agreed thereto. Thus practically an entirely new management of the plant (Government management) took charge of the operations and performance of said contracts from January 23, 1939. On December 20, 1939, the Maritime Commission notified the company that it was not satisfied with the management of the plant, which in fact the Government managed, and that a Mr. P. B. Brill from its office would be named general manager of the company at $10,000.00 a year and after having made all the arrangements, suggested to the company that it go through the form of hiring him. Mr. Kreher, who had been general manager in name only after the aforesaid Government management took over, again protested such action without avail, and Mr. Brill was placed in complete charge of the plant as general manager. Mr. Kreher was then president of the company in name only, having no say as to the performance of said contracts. By the

fall of 1940, the aforesaid management had placed the company in debt, financial difficulties, and completed Hull # 33 at a loss of $320,000.00. However, no liens were filed against the vessels, nor were any suits filed against the company. The Government also claimed the company was in default in performance of the contracts and that it was insolvent. This position was taken by the Government after it had managed the shipyard for a year and half.

5. The Government next wrote up a plan of reorganization of the company, dated October 29, 1940, and organized the Tampa Shipbuilding Company, Inc., as heretofore mentioned. In addition to the Navy acquiring the shipyard and the drydock, it acquired under this plan Hulls 34 to 40 for conversion into naval auxiliaries and immediately paid the new company higher prices for Hulls 34, 35 and 36. There was no evidence by the Government as to why these higher prices were not paid to the old company. The new corporation took over all the assets and liabilities of the old corporation, and was to all intents and purposes the same as the old corporation, no new capital having been put up except the said $500.00. Under this plan the Government forced each stockholder of the old company to give up two shares of stock in the old for 1 share in the new company. The president of the old company, Mr. Ernest W. Kreher, protested and opposed the plan of reorganization, but yielded under threats from the Government officials, stating that the Government was too big for him to fight. The new corporation, under said plan of reorganization, had a capitalization of 10,000 shares of no par value common stock. Stockholders of the old company received 3600 shares thereof, same being nonvoting stock, termed "Class A". The remaining 6400 shares the Government had issued to its agents and employees, as follows: Howell, 4900 shares; Gray, 750 shares; and Brill, 750 shares. This stock was

voting stock and termed "Class B" stock. The Government gave these men the Class B Stock for acting as its representatives in taking over the shipyard for the use and benefit of the Navy, as aforesaid. Howell, under the Government plan, was to hold the stock in trust until the amount owed the Government in loans had been paid off, at which time, he, Brill, and Gray owned it outright. The former officials of the old company against which there was no evidence of inefficiency or misconduct, were denied offices in the new company, as the Government wanted no interference by them, preferring to have its representatives manage the new company. In 1945 when World War II was over and the Navy had no further use for the shipyard the stockholders holding the Class A Stock sold their 3600 shares at $100.00 a share, which was the amount it cost them, and which represented the value of the stock immediately prior to the reorganization by the Government. The Stockholders consequently lost $355,300.00, as a direct result of the taking by the Government of the property of the old company and forcing them to take one share for two, as aforesaid. The capital stock in the old company amounted to $715,300.00. The Class B stockholders sold their shares at $200.00 per share, realizing $1,280,000 as a gift from the Government and for which stock they had paid nothing, as aforesaid. Also the class B stockholders received dividends totaling $76,800.00. The amount represented by the latter figure reflects additional property taken away from the old company by the Government.

On the two series of Government contracts entered into with the Government by the old company, the Government in taking over the old company, showed a profit of $423,-031.52 in completing same, which the Government pocketed and failed to credit in favor of the old company.

6. The assets of the old company according to its books amounted to $2,977,340.12 and the liabilities $2,020,061.18. The assets at the time of the taking exceeded its liabilities in the sum of $957,278.94. These figures do not include the equity values in the Hulls, nor the indebtedness thereon. Suffice it to say, however, that when completed, the contracts on Hulls 34-40 showed a profit of $423,031.52, as aforesaid. The court below should have awarded judgment for $957,278.94, plus the profits realized on the said Hulls, as aforesaid; or in the alternative should have rendered judgment for said $1,280,000.00 taken away from the old stockholders by the Government, which amount of stock represented the value of the property, in part, after the Navy had completed its ship contracts and World War II came to an end.

Statute Involved

The statute involved is the Fifth Amendment to the Constitution of the United States, reading in part as follows:

> "No person shall • • • be deprived of life, liberty, or property, *without due process of law;* nor shall *private property be taken for public use, without just compensation.* (Italics supplied)

Questions Presented

1. Did the defendant have the right to demand that the shipbuilding company be managed by its own personnel in the performance of said contracts?

2. Was the defendant legally entitled to draw up a plan of reorganization of the company?

3. Did the interference by the defendant with the performance of the contracts, work to the detriment of the contracting company?

4. Was the defendant justified in reorganizing the company because of alleged insolvency and inability of the company to pay its debts? Was that the function and right of the defendant, or was it a scheme of defendant to take over the shipyard for the exclusive use of the Navy?

5. Isn't the fact that the defendant reorganized the company, and not its officers and stockholders, conclusive that the Government took the shipyard and operated same for its own benefit in the name of the Tampa Shipbuilding Company, Inc.?

6. Isn't the fact that the officials of the new company were all representatives of the Government, conclusive that the Government wanted exclusive use of the yard?

7. Why should the defendant take steps to reorganize a company, rather than terminate the contracts because of default and foreclose on its mortgages for money lent to the company, which latter action was all it was legally entitled to do?

8. Why should the defendant allow its representatives to receive 6400 shares of stock of the new company without investing a nickel in the new company or paying for the stock, save and except to have its men carry out its avowed purpose to take over the plant and operate same for the use of the Navy?

9. Why should the stockholders of the contracting company be stripped of their stock holdings to the extent of one-half and have no voice in voting their stock in the new company, save and except that the defendant wanted no interference by them in its use of the company for the benefit of the Navy?

10. Why should the ultimate profits on the performance of the ship contracts, which were realized by using the plant

and equipment of the contracting company, be pocketed by the defendant, having already taken away one-half of said stock?

11. The record below showing that the defendant lost nothing on the ship contracts and all its loans being paid in full, why should the Government be allowed to retain the item of $957,278.94 being the amount of assets over liabilities taken by it, as aforesaid?

12. The record below admitting that the Government saved itself millions of dollars by taking over the Tampa Shipyard, should it not be required to reimburse the company the above items, because of taking and using its shipyard, as aforesaid?

Reasons Relied On for Allowance of the Writ

The writ should issue for the following reasons:

1. The lower court erred in holding that the defendant was excused from liability on its contracts and taking away the stock and assets, as aforesaid, because Howell had been an official of the Tampa Chamber of Commerce and was interested in the well-being of the city of Tampa in establishing a large shipyard there; rather than holding that Howell was in fact at all times acting as trustee for the Government, and acted as such in having all loans made by the Reconstruction Finance Corporation paid off in full, principal and interest. The evidence is that Howell was trust officer of the Exchange National Bank of Tampa, Fla., the designated trustee in the R.F.C. loans. Howell gave up his position with the bank at the request of the Maritime Commission. (See Goertner testimony pp. 61, 62, Deft's Ex. D, Record below.) Where private property is taken for public use by agents of the United States, the Government is under implied obligation to make just com-

pensation therefor. *Phelps* v. *United States,* 47 Sup. Ct. Rep. 611; 274 U. S. 341.

2. The lower court erred in holding as a fact, and stating in its opinion, that the Plan of Reorganization was proposed by Howell. The Plan was in the form of a letter, dated October 29, 1940, from which the lower court quoted at length in its special findings of fact No. 27. Testimony was offered by the defendant in the court below, and received in evidence, as shown by pp. 140 and 141, Defendant's Ex. D., Tr. Rec. below, that the said letter of October 29, 1940, mentioned in said findings No. 27, was prepared by Mr. Anderson, Director of Finance, Maritime Commission; Mr. Farbach, Chief Counsel of the Commission, and Mr. Stafford of the Reconstruction Finance Corporation, who later was named Asst. Secretary and Asst. Treasurer of the corporation organized by the Government; also Mr. Goertner of the Maritime Commission, who was its Assistant General Counsel. Page 7 of said letter was *rewritten by Mr. Anderson* in his office at the Maritime Commission on Saturday, October 30, 1940, after the Commission had approved same, as it did not want to be in position of approving stock transactions and requested that par. 19 be eliminated from letter of October 29, 1940. (Italics supplied.)

Mr. Howell testified under oath at the Hearings before the Committee on the Merchant Marine and Fisheries (Deft's Ex. D, below), at page 140, as follows:

> "On page 13 of the report it states that I proposed the reorganization. As stated elsewhere in this report, I had nothing whatever to do with formulating the plan of reorganization. I became a party to it at the insistence of the Commission and the Reconstruction Finance Corporation."

In spite of this admission of fact by the Government's own witness in the court below, the court held as a fact that Howell proposed the Plan, which is highly prejudicial to plaintiffs' case, because if the defendant proposed it, the Government is liable for all consequential damages growing out of said taking.

Howell's letter to the Comptroller General, dated October 12, 1942, quoted in part, at the bottom of page 164, Deft's Ex. D, reads as follows:

> "The actual facts of the case not only disprove all the allegations, inferences, and suggestions of wrongdoing, but establish conclusively that the transactions complained of were conceived by the United States Maritime Commission and the Navy Department, to meet ship emergencies and necessities then confronting the Federal Government in its war program and that the Tampa Shipbuilding Co., Inc., the Tampa Shipbuilding & Engineering Co., and myself were merely agencies through which the transactions conceived by the Commission and the Navy Department *for their own purposes and benefits* were carried out; that the transactions did adequately and promptly meet the emergencies and necessities of the Government and that no present benefit, financial or otherwise, inured to me, the Tampa Shipbuilding & Engineering Co., or the Tampa Shipbuilding Co., Inc." (Italics supplied.)

There can be no better admission on the part of the defendant, than the above quoted testimony in the court below, proving that the defendant took the profits of the said ship contracts; the stock of the old company, and the entire plant, equipment, dry dock, and real estate of the contracting company, for its own purposes and benefits. (See *Yearsley* v. *W. A. Ross Construction Co.*, 60 Sup. Ct. Rep. 413; 309 U. S. 18.) Yet the court below refused to find this testimony as facts, contending that nothing was taken from the old company within the meaning of the Fifth

Amendment. The ignoring of these facts was prejudicial to plaintiffs' case, and unjust. The court held that the plan of re-organization was unanimously approved by the stockholders of the old company. The defendant having managed its affairs for a period of a year and a half prior thereto and being in full control of the yard, there was nothing left for the stockholders to do than to go through the form of approving the Government's plan to take the yard, because as shown by the evidence, the defendant would have taken it anyway. Also, in approving this plan, as aforesaid, the stockholders did not know that the Navy would immediately pay to the Government's company $900,000.33 for the incompleted hulls, as described below.

Whenever the United States seizes private property there is an implied obligation to pay for it.

The contracts were property within the meaning of the Fifth Amendment and as they were taken for public use the Government is liable. It was so held by this court in *Omnia Commercial Co. Inc.* v. *United States,* 43 Sup. Ct. Rep. 437; 261 U. S. 502.

If the property so taken by the Defendant is not paid for, the burden falls upon the stockholders, whose property was taken, as aforesaid, and not upon the public, for whose benefit the shipyard was taken over for use of the Navy. Payment should be made to prevent inequality. See *Michigan Cent. R. Co.* v. *Slack,* 17 Fed. Cas. No. 9527a, affirmed in *Railroad Co.* v. *Collector,* 100 U. S. 595.

The lower court failed to apply the principles laid down by this court in the aforementioned cases. We also cite as authorities for granting the writ, the following cases, viz: *U. S.* v. *Miller,* 63 Sup. Ct. 276, 317 U. S. 369. *U. S.* v. *Lynah,* 23 Sup. Ct. 349; 188 U. S. 471.

3. The lower court erred in holding that the stockholders of the old company were fortunate in having the new cor-

poration take over the assets of the old company in consideration of the assumption of its obligations and liabilities, when as a matter of fact the new corporation had the same assets and liabilities as the old company. The only change was its exclusive management by the Government's representatives in behalf of the Navy, together with change of name. No third parties invested new capital; nor purchased stock in the new company. It was in fact no re-organization, but a complete taking over by the Government.

4. The lower court erred in holding that the defendant acquired no benefit from the sale to the new company, except indirect benefit of having the ships completed free of claims without the expense and delay incident to bankruptcy, receivership, or foreclosure proceedings. This is entirely contra to the evidence offered by the Government itself in the court below. See Deft's Ex. D, at page 57, where it is stated that the hulls that were taken over and converted to Navy use in their incompleted state, saved the Navy, "probably upwards of a million dollars a vessel," because the Navy did not have to take completed vessels in another yard and convert them to its uses. The court below refused to find this admitted evidence as a fact, all to the prejudice of plaintiffs.

5. The court erred in holding that nothing was taken within the meaning of the Fifth Amendment from the old company. As shown by defendant's own testimony, the Navy paid the new company $5,513,248.00 on or about November 12, 1940, for the incompleted Hulls Nos. 34, 35, and 36, out of which the Maritime Commission was immediately paid $4,613,247.67 for moneys advanced by it on the aforesaid contracts covering Hulls 34, 35, and 36, leaving $900,000.33 additional capital in the immediate possession of the new company. This payment by the Navy was about

7 days after the defendant had incorporated the new company. The defendant has not, and cannot explain why this transaction and payment was not made to the old company, which had in fact constructed these vessels to the aforementioned state of completion, the new company having furnished no labor or material thereon, nor advanced any money. The inescapable conclusion is that the defendant was determined to freeze out the old management and stockholders and get full use and control thereof through its representatives, Howell, Brill, and Stafford. If this were not so, why didn't the Navy pay the old company $5,513,248.00, deducting therefrom $4,613,247.67 for the Maritime Commission, which payment certainly would have removed any fear of bankruptcy, receivership, or foreclosure upon the part of the Government, if any it had.

6. As further evidence the defendant took the shipyard for the use of the Navy, we quote the following from said Deft's Ex. D, at pp. 83, 84, record below:

> "Mr. Culkin: And your group, your division of the Navy, was influenced by the need for this plant?
>
> Captain Gokey: Yes sir; especially as far as the repair facilities were concerned
>
> Mr. Culkin: Yes; that was a needed thing and a continuing proposition.
>
> Captain Gokey: Yes Sir.
>
> Mr. Culkin: That is, assuming you do not get control of the submarines?
>
> Captain Gokey: They had a dry dock there to start with, and some repair facilities.
>
> Mr. Culkin: Did the Government build the dry dock facilities?
>
> Captain Gokey: That was done under a P.W.A. loan, I think.
>
> Mr. Culkin: That will take in the largest ship, I assume?

Captain Gokey: No; not the largest sized ship, but a fair sized ship. I would say, maybe a cruiser, up to the size of a cruiser.

Mr. Culkin: But it was a necessary, logical allocation in the judgment of your group?

Captain Gokey: Yes sir.

Mr. Culkin: Necessary for this type of development, and I assume that is what influenced your choice?

Captain Gokey: Very definitely."

From the above testimony, the lower court refused to find as a fact that the shipyard was taken by the defendant for the Navy, even though it was uncontradicted and offered in evidence by the defendant below. The failure to find same as a fact was grossly erroneous, prejudicial to plaintiffs' case, and conclusive evidence that the plan of reorganization was not proposed by Howell because of friendship for the Krehers and as a public spirited citizen for the well being of the city of Tampa, and its Chamber of Commerce, as the court held. As of December 10, 1942, the Maritime Commission could have put Howell out of office any time they wanted to, as testified by him on that date at the Hearings before the Committee (Deft's Ex. D, page 115). Howell, therefore, was working for the Government, and not as president of a private corporation.

7. The court erred in denying plaintiffs' motion for a new trial, which was based in large part upon the request that the court amend its findings of fact, and make the additional findings of fact as mentioned above. Substantial testimony in favor of plaintiffs, most of which having been offered by the defendant was totally disregarded by the court below, as has already been fully outlined, supra. Unless the writ is granted, such action of the court will remain uncorrected.

8. Further, the court erred in holding that the case should be dismissed for lack of authority in three of the six trus-

tees to prosecute the suit below under the Florida statutes. The suit was brought by Ernest Kreher, Max Kreher, and Paul Kreher, who owned 4580 shares of stock of the 6700 shares of stock outstanding on the books of the company at the time of the taking of the company by the defendant. In addition they were a majority of the trustees of the dissolved corporation. These plaintiffs could not have joined the trustees, Phillips and Gray, because Phillips was, and still is, United States Attorney in Tampa, and Gray realized $150,000.00 as a gift from the Government, as aforesaid. The remaining trustee, Standfuss, testified in favor of plaintiffs, and had no objection to the suit being filed. We submit that the case below was properly brought under the provisions of Sec. 610.18, 1941 Florida Statutes. As this was a matter of defense raised by the defendant, counsel for plaintiffs moved at the argument below for permission to amend the caption in order to cover any technical defects, which should have been granted by the court. However, the court held no recovery could be had on the merits.

It is, therefore, respectfully requested that the writ should issue in the case at bar, in order that equity and justice may be done.

Respectfully submitted,

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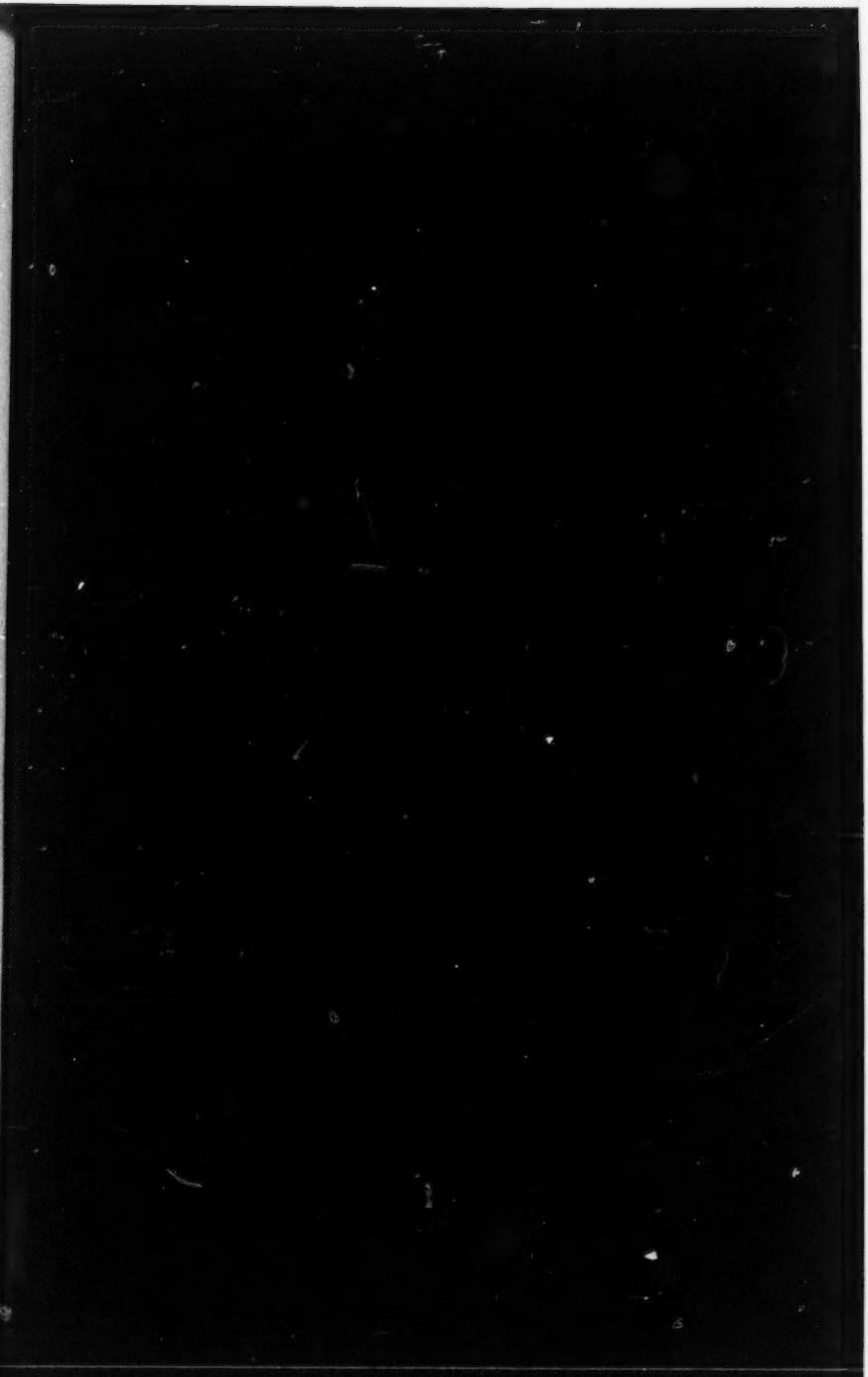

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